

**AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE  
MONETARY PENALTIES ACT**

**DECISION**

In the matter of an application for a review of the facts of a violation of provision 140(1) of the *Health of Animals Regulations* alleged by the Respondent, and requested by the Applicant pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

**Curtmar Farms Limited, Applicant**

**- and -**

**Canadian Food Inspection Agency, Respondent**

**CHAIRMAN BARTON**

**Decision**

**Following an oral hearing and a review of the written submissions of the parties including the report of the Respondent, the Tribunal, by order, determines the Applicant did not commit the violation and is not liable for payment of the penalty.**

## REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

The oral hearing was held in Truro on June 27<sup>th</sup>, 2006.

The Applicant was represented by its President, Mr. Curtis L. Moxsom.

Evidence for the Applicant was given by Mr. Moxsom and by Mr. Frank Berkelaar.

The Respondent was represented by its solicitor, Mr. Marc A. Deveau.

Evidence for the Respondent was given by Ms. Mary Anderson and Mr. Eric Weeks.

The Notice of Violation # 0506AT0182 dated January 19, 2006 alleges that the Applicant on the 23<sup>rd</sup> day of September, 2005, at Carbonear in the province of Newfoundland committed a violation namely: "Overload a conveyance or cause a conveyance to be overloaded" contrary to provision 140(1) of the *Health of Animals Regulations*, which states as follows:

140(1) No person shall load or cause to be loaded any animal in any railway car, motor vehicle, aircraft, vessel, crate or container if, by so loading, that railway car, motor vehicle, aircraft, vessel, crate or container is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.

At the outset of the hearing I ascertained whether each party had copies of the following key documents in this file:

- Notice of Violation dated January 19, 2006.
- Letter dated March 6, 2006, from the Applicant requesting a review.
- Letter dated March 16, 2006, from the Respondent enclosing its report.
- Letter dated April 6, 2006, from the Applicant with further submissions.

Having confirmed both parties had copies, these documents were entered on the record as evidence for the purpose of the hearing.

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With the consent of both parties, I amended the Notice of Violation by changing the

person it was issued to from Curtis Moxsom to Curtmar Farms Limited on the basis that Mr. Moxsom at all times was acting as its representative in the course of its business.

Both parties further agreed that the only issue in this case was whether there was overcrowding in the two front compartments of the trailer as a result of the weight of the 12 calves in the upper section and 13 calves in the lower section.

The undisputed facts are as follows:

- At a community pasture near Carbonear, Newfoundland, the Applicant supervised the loading of cattle onto a cattle trailer owned by Leslie Carter Livestock Dealer.
- The Applicant had purchased the cattle to be transported from Carbonear to the Applicant's farm near Truro, Nova Scotia.
- The driver was Mr. Sylvester Weatherbie.
- The overnight trip from Carbonear to Port aux Basques took approximately ten to twelve hours.
- Although the trailer was weighed at a provincial weigh scale during the trip and found to be overweight (and there was no provincial tolerance allowance), it was agreed this incident was not relevant to the present case.
- The load arrived at the quarantine station at Port aux Basques at approximately 9 a.m. on September 23, 2005, and shortly after was inspected by Ms. Anderson.
- Following the inspection, the trailer was loaded onto the ferry and continued without incident to the Applicant's premises near Truro.

### **Evidence of overcrowding**

In her Inspector's Non Compliance Report set out in the Respondent's record, Ms. Anderson noted that the animals in the trailer seemed restless but were all standing. She also indicated the feeder calves in the front compartments appeared to be overcrowded and uncomfortable, were more restless than the other animals on board and she could feel heat from the compartments while standing outside.

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In her written statement dated March 13<sup>th</sup>, 2006, she also stated "I immediately noticed that the animals on board were restless (from the jostling and bawling of same)".

On cross-examination Ms. Anderson did acknowledge that the bawling could have been as a result of the calves being hungry and having recently been separated from their mothers.

Ms. Anderson then measured the compartment in the front part of the trailer to determine the recommended density on the basis of the average weight of the twelve calves in the upper section as 550 pounds and the average weight of the calves in the lower section as 500 pounds, both as estimated by the driver, Mr. Sylvester Weatherbie. Ms. Anderson then applied a mathematical formula to determine the recommended maximum number of calves that could comfortably be transported. This formula is set out in guidelines developed by the Canadian Agri-Food Research Council (CARC), and which are widely accepted in the industry (see formula attached to the Inspector's Non-Compliance Report). Evidence that a guideline has not been followed is not determinative that a violation has been committed, but is certainly cogent evidence in this regard.

Ms. Anderson acknowledged she had made an error in her calculations, and subsequently the recommended maximum loads were recalculated to be 10.5 calves in the upper section and 12.07 calves in the lower section.

On cross-examination, Ms. Anderson acknowledged she had no experience in estimating the weight of cattle, and relied entirely on the weights as given to her by the driver.

Mr. Weeks outlined his extensive experience in the industry and confirmed his discussions with Ms. Anderson on the morning of September 23<sup>rd</sup>, 2005.

He testified that the best spring calves from Newfoundland come from Carbonear and that the weight estimates of 500 and 550 pounds were in the ball park. He said he confirmed this after discussions with other knowledgeable persons in the industry. He also was of the view that a 550 pound calf should fit in the front compartment of a trailer notwithstanding the 51 inch height restriction.

Mr. Moxsom, in his written and oral evidence, testified he had been in the livestock business for 35 years and was well qualified to estimate the live weights of livestock. He estimated the weights of the calves he loaded in the front pen of the trailer to be an average of 350 to 400 pounds. At the time of loading he stated that two of the pasture managers on site told him he could put two more calves in each compartment and he told them he did not want to do this as he wanted the calves to have lots of room.

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He stated this is where the smaller calves are loaded due to the height restriction of 51 inches in the front compartments of the trailer. He indicated that, if these compartments had contained cattle of 550 pounds, there would have been some evidence of scraping on their backs, which was not the case here.

He also gave evidence that 39 of the 73 cattle in this load were sold on September 29, 2005, and that the seller's receipt shows an average weight of approximately 525 pounds. He testified that some of the smaller calves were not sold on September 29, 2005, but were held back to be sold later as cow-calf combinations, implying that the calves in the front compartments had considerably less average weight than the overall average of 525 pounds.

Mr. Moxsom further stated that the inexperienced young 18 year old driver was on his first trip to Newfoundland and was not qualified to estimate the live weights of livestock.

As earlier indicated, the Respondent acknowledged the sole issue was whether the front two compartments of the trailer were overloaded (by reason of too much weight) based on the recommended maximum loading densities as set out in the CARC guidelines. The only evidence of the live weights of the calves in the front two compartments was given by Mr. Moxsom in his written and direct oral evidence and by the driver in his written evidence. (The driver was not called as a witness by the Respondent.)

If the calves in the front two compartments had weighed an average of 400 pounds (the top range provided by Mr. Moxsom) and applying the CARC formula, I calculate the recommended maximum density for each compartment to be 13.7 calves, and the compartments would not be overcrowded according to the tolerance in the guidelines.

Further, the Respondent inspected the cattle after a 10 to 12 hour overnight trip from Carbonear to Port aux Basques. There was no evidence on arrival of any injury or undue suffering of the calves in the front two compartments. As earlier indicated the only evidence of the condition of these calves was that they were bawling and heat was coming from the compartments. This would appear not to be an abnormal situation following a lengthy trip and having been recently removed from their mothers.

The CARC guideline containing the density formula relied upon by the Respondent also contains warning signs of overcrowding. These are that the load will not settle, animals will continue to scramble for footing, the load continues to be noisy for prolonged periods of time, or animals involuntarily lie down and are unable to get up. In this case, none of these warning signs appears to be evident, even after the 10 to 12 hour trip.

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In all cases the onus is on the Respondent to establish, on a balance of probabilities, that the Applicant committed the violation.

The evidence of the Respondent of overcrowding is based almost entirely on the weight of the animals as estimated by the young and inexperienced driver, and which evidence has been put in considerable doubt by the direct evidence of the Applicant. The driver

and the Applicant were the only persons who saw the cattle and who estimated their weight. The hearsay evidence of the driver carries considerably less probative weight than the direct evidence of Mr. Moxsom.

Accordingly, I find that the Respondent has not satisfied its burden of proof.

Dated at Ottawa this 11<sup>th</sup> day of July 2006.

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Thomas S. Barton, Q.C., Chairman